IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM B. CLAY, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	No. 08-1255

OPPOSITION TO MOTION FOR STAY PENDING JUDICIAL REVIEW

In 2006, the Federal Communications Commission modified its procedures for considering proposals to change the licensed communities of FM radio broadcast stations.[1] Instead of the former two-step process—first, a rulemaking to allot the FM channel at issue to a new community, and second, a proceeding to license a station on that channel—the FCC now considers such proposals in a streamlined application process that is intended to facilitate improved service to the public. The application process continues to use well-established substantive standards for allotting FM channels to communities, standards designed to carry out the statutory goal of distributing radio service fairly and equitably nationwide. The FCC also adopted procedural safeguards to assure that interested parties would have a reasonable opportunity to participate in the application process.

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[1] *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 21 FCC Rcd 14212 (2006) ("*Order*").

Although the new rules have been in effect for 19 months, William B. Clay now asks the Court to stay the rules pending review. His request is premised on alleged flaws in the FCC's longstanding substantive standards for allotting FM licenses, rather than on the streamlined procedural rule changes actually adopted in the *Order*. He is also asking for a stay despite the fact that, because Clay has a pending petition for reconsideration before the agency, his challenge to the FCC's Order is incurably premature. (Indeed, for this reason, this Court on its own motion has ordered Clay to show cause, by September 8, 2008, why this case should not be dismissed. Order (Aug. 7, 2008)). As we show below, the stay request is procedurally defective and does not come close to meeting the demanding test for extraordinary relief. It should be denied.

BACKGROUND

Section 307(b) of the Communications Act of 1934 (the "Act") requires the Commission to allocate radio frequencies "among the several States and communities [so] as to provide a fair, efficient and equitable distribution of radio service." 47 U.S.C. § 307(b). In the early 1960s, the FCC established a nationwide FM Table of Allotments as the best means of fulfilling Section 307(b)'s mandate for the then-immature FM service. *Revision of FM Broadcast*

Rules, 40 FCC 747, 756-58 (1963).[2] To allocate non-reserved band FM channels—primarily used by commercial stations—to broadcasters, a channel first had to be allocated to a community in the Table through a rulemaking proceeding. *See id.* at 1292. In such proceedings, the FCC would consider a broadcaster's initial proposal and mutually exclusive counterproposals.[3] *See id.* Second, a prospective broadcaster would have to apply for a license or construction permit for that channel in that community.

Citing the slow and burdensome nature of this "redundant" two-step process, the FCC long ago shifted to a one-step process for FM station modifications that did not involve a community of license change, such as station class upgrades on the same or an adjacent channel and channel substitutions. *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications By Application*, 8 FCC Rcd 4735, 4736 (1993). Under a one-step process,

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[2] *See Crawford v. FCC*, 417 F.3d 1289, 1292 n.1 (D.C. Cir. 2005) ("In the Table, each channel allocated to a particular community is identified by a number between 221 and 300, which designates the frequency. This number is followed by the station's class … , with each class designation signifying maximum and minimum signal strengths and antenna heights.") (citing 47 C.F.R. §§ 73.201-.202, .211(a)-(b)).

[3] "Generally, two proposals are mutually exclusive if channels that they propose would violate the FCC's prescribed minimum distances between stations of given classes and separations on the FM spectrum. The purpose of these prescriptions is to limit signal interference." *Id.* at 1292 n.2. After the initial comment period on the proposal, "any proposals that are mutually exclusive with those considered in the proceeding are 'cut off' from consideration pursuant to 47 C.F.R. § 1.420(d)." *Id.* at 1293.

modification proposals are submitted in applications and processed on a "first come, first served" basis, receiving cutoff protection from later-filed applications. Proposals to change a station's licensed community remained subject to the two-step process, however. *See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 20 FCC Rcd 11169, ¶ 14 (2005) ("*Notice*").

Over the years, the FCC developed allotment priorities and policies to carry out Section 307(b)'s goals in evaluating petitions to modify the Table. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) ("*FM Priorities*"). Pursuant to these standards, the FCC accords first priority to a proposal to provide a community with "first full-time aural service" (reception service), second priority to "second full time aural service, and third priority to "first local service" (transmission service). *Id.* at 90 FCC 2d 91-93.[4] The third priority – the "first local service" priority – awards a decisive preference to proposals that would provide a community with a first local outlet for self-expression. In applying the third priority, the Commission has acknowledged that "an ostensibly independent and distinct community lacking radio transmission

[4] The FCC accords "co-equal status" to the second and third priorities to avoid anomalous results that were possible under an older set of the priorities. *FM Priorities*, 90 FCC 2d at 91-93 ("In cases involving a choice between ... second aural and first local services, the populations provided each of those services would be compared. Preference would be given depending on whether more persons would receive a second aural service or a first local service.").

service of local origin might nonetheless have at its disposal adequate broadcast facilities for local self-expression" if the community is an integral part of a larger metropolitan community. *Beaufort Co. B'casting Co. v. FCC*, 787 F.2d 645, 652 (D.C. Cir. 1986). In *Faye and Richard Tuck*, 3 FCC Rcd 5374, 5377-78 (1988) ("*Tuck*"), the FCC outlined eight factors that it would use to determine whether a suburban community is sufficiently independent of a nearby metropolitan area to merit a first local service preference.[5] The FCC has applied *Tuck* consistently since 1988.

The *Order* on review streamlined the process for FM stations to seek community of license changes, concluding that the first step under the old process, *i.e.*, a rulemaking proceeding, is no longer necessary to consider such changes given the maturity of the FM service. *Order* ¶¶ 9-10, 15. In sharp contrast to the early 1960s, "when little interest was shown in FM use (and that mostly in major

[5] The eight factors are: "(1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries." *Tuck*, 3 FCC Rcd at 5378.

cities)," *FM Priorities*, 90 FCC 2d at 88, and there were approximately 1,300 FM stations nationwide, at the time of the FCC's *Notice* there were more than 6,200 FM stations operating on frequencies in the Table of Allotments, with a concomitant rise in the number and complexity of rulemaking petitions to amend the FM Table. *Notice* ¶ 7. The FCC concluded that a streamlined, one-step application process would facilitate service improvements without sacrificing the goals of Section 307(b). *Order* ¶¶ 9-10. The FCC explained that "adopting the proposed new procedure will preserve limited agency resources, reduce the time needed to process community of license changes, and, accordingly, expedite the provision of enhanced broadcast service to the public." *Id.* ¶ 9. In addition, the Commission stated, the modern congestion of FM spectrum and the FCC's minimum distance requirements, *see supra*, n.3, would restrict the migration of stations to metropolitan areas with larger audiences (and greater potential advertising revenues), and continued use of its substantive allotment standards would assure the fair and equitable distribution of radio service. *Id.* ¶ 10.

As part of the new application process, the agency required applicants to submit "a detailed exhibit demonstrating that the proposed change constitutes a preferential arrangement of allotments under Section 307(b) of the Act as compared to the existing allotment(s)," and emphasized that it would carefully apply the *Tuck* factors to assure "that a first local service preference will not be

awarded to a community that is largely interdependent with the Urbanized Area or surrounding communities." *Order* ¶¶ 10-11.

The FCC was careful to protect the ability of other broadcasters and members of the public to participate in the modified one-step application process. *Order* ¶ 12. Although it recognized that community of license change applications would not be subject to petitions to deny, the FCC explained that "this does not prevent other broadcasters and members of the public from participating in the process of evaluating the grantability of a minor modification application to change community of license." *Id.* For example, the Commission stated, "[a]rguments, evidence, and precedent may be presented in an informal objection as readily as in a more formal petition to deny, and are subject to the same evidentiary and legal standards." *Id.* (noting that the right to file a petition for reconsideration, *see* 47 U.S.C. § 405, "provides a safety net for both relevant public interest considerations and participation by interested parties").

Due to the importance of local broadcast service to the public, the FCC also adopted extra safeguards to ensure that local residents of affected communities receive notice and a reasonable opportunity to participate. Aside from providing that proposed minor modification applications would be listed in the "Broadcast Applications" public notices issued by its Media Bureau, the FCC required that proponents of such changes give local public notice in accordance with

Commission rules. *Id.* The Commission also required that its Media Bureau provide *Federal Register* notice that a change in community of license application has been filed, and imposed a 60-day waiting period after such notice before Commission action could be taken on any such application. *Id.*

The FCC adopted the *Order* on November 3, 2006; the new rules took effect on January 19, 2007. *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Broadcast Service*, 71 Fed. Reg. 76208-1 (Dec. 20, 2006). On January 18, 2007, William B. Clay filed a petition for reconsideration, which remains pending before the agency. *See* Motion at Exhibit E. On August 25, 2008, approximately 19 months after the *Order* went into effect, Clay filed the instant Motion for Stay, which seeks to "stay the Commission's (1) acceptance, processing, or grant of any application to change the community of license of any broadcast facility . . . where the application in whole or material part claims 'first local service' preference, and (2) issuance of any license for a facility so authorized . . . " Motion at 20.

ARGUMENT

I. THE STAY APPLICATION IS PROCEDURALLY DEFECTIVE.

Clay's stay motion faces three fatal threshold objections. First, Clay did not seek a stay from the FCC as required by FRAP 18(a)(1), under which "[a] petitioner must ordinarily move first before the agency for a stay pending review of

its decision or order." This is "[t]he cardinal principle of stay applications." 16A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3954 (3d ed. 1999). Although Clay suggests that he satisfied this requirement by asking the FCC to reconsider the *Order* "prior to allowing individual licensing determinations to become final," Motion at 4, examination of his reconsideration petition reveals no request for a stay. Clay notes that a different party did move for a stay, *id.* at n.3, but that stay motion cannot meet the rule's requirements, because, at a minimum, a stay requires irreparable harm *to the moving party*. *Cuomo v. U.S. Nuclear Reg. Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). The FCC could not determine the likelihood of irreparable harm to Clay, which he asserts based on itinerant listening habits peculiar to himself, *see* Motion at 14-16, by reviewing a different motion that does not address that asserted harm. Further, Clay does not maintain that filing an initial stay motion before the Commission would have been "impracticable," as required under FRAP 18(a)(2), nor could he do so credibly since has had 19 months to file an initial motion. *Cf. Chemical Weapons Working Group (CWWG) v. Dept. of the Army*, 101 F.3d 1360 (10th Cir. 1996) (FRAP 8(a) requirement that a motion in the court of appeals show that an initial motion before the district court would be impracticable was not satisfied where plaintiffs waited for six weeks to appeal from district court order, and another week before seeking stay).

Second, Clay's petition for reconsideration pending before the FCC renders his appeal of the *Order* "incurably premature," and mandates that the appeal be dismissed for lack of jurisdiction. *BellSouth Corp. v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994); *Wade v. FCC*, 986 F.2d 1433, 1434 (D.C. Cir. 1993) (per curiam); *TeleSTAR, Inc. v. FCC*, 999 F.2d 132, 133-34 (D.C. Cir. 1989) (per curiam). Indeed, as we have noted, on August 7, 2008 this Court ordered Clay to show cause why this case should not be dismissed as incurably premature.

Third, the stay motion is moot because the *Order* took effect 19 months ago, on January 19, 2007. A stay cannot preserve a state of affairs that long ago ceased to exist. *See Graddick v. Alabama*, 453 U.S. 928, 936 (1981) (Powell, J., in chambers) ("Graddick's request for a 'stay' is now moot. Ordinary linguistic usage suggests that an order, once executed, cannot be 'stayed.' Affirmative action then becomes necessary to restore the status quo."); *Reed v. Rhodes*, 472 F.Supp. 603, 605 (N.D. Ohio 1979) ("A stay does not reverse, annul, undo, or suspend what has already been done..."). As the rules adopted in the *Order* have been in effect for the past 19 months, their effectiveness cannot be stayed.

II. THE STAY APPLICATION DOES NOT MEET THE TEST FOR A STAY

Even if Clay could surmount these threshold objections, he has failed to satisfy the stringent standard for the extraordinary relief he seeks. "The factors to be considered in determining whether a stay is warranted are: (1) the likelihood

that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Cuomo v. U.S. Nuclear Reg. Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (citations omitted). None of these factors supports a stay here.

A. Clay Is Not Likely To Prevail On The Merits.

To obtain a stay, Clay must make out, at the very least, "a substantial case on the merits." *Cuomo*, 772 F.2d at 974, quoting *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits."). Clay cannot satisfy this standard. Not only is Clay's appeal unripe, he is unlikely to prevail on any of his claims.

The ripeness doctrine serves "'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and *its effects felt in a concrete way by the challenging parties.*" *Mt. Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462, 1466 (D.C. Cir. 1989) (emphasis in original), quoting *Abbott*

Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). Clay argues that most application grants pursuant to the *Order*'s new procedures are arbitrary because of alleged defects in the FCC's allotment standards for determining whether to grant a first local service preference. *See* Motion at 6-14. Those standards, which require a fact-specific determination of whether the communities at issue are interdependent, *see Tuck,* 3 FCC Rcd at 5378 ("the evidence necessary to demonstrate such relationship will vary depending on the circumstances in a particular case"), are applied in individual application proceedings in which interested parties can participate. *See, e.g.*, Motion at 3-4 and Exhibit A (citing pending petitions for reconsideration of community of license change application grants). Thereafter, if a decision is adverse to them, interested parties may seek judicial review. 47 U.S.C. § 402(b)(6). By contrast, the *Order* Clay seeks review of neither modified the FCC's substantive allocation standards nor applied them to any individual community of license change proposals.

An adjudicatory proceeding on a specific proposal that relies on the first local service preference, and not the present rulemaking on streamlining procedures, is the proper place for resolving, first at the FCC and then, if necessary, on appeal to this Court, Clay's substantive challenge to a given broadcaster's attempt to rely on the preference. In the event that Clay is aggrieved by the outcome of such an adjudicatory proceeding at the agency, Clay at that time

will have the opportunity to seek a stay of the specific grant at issue. "[I]t seems obvious that a reviewing court will be in a better position to evaluate the propriety of any Commission action with the totality of that action before it." *Mt. Wilson*, 884 F.2d at 1466 (first-step FM channel allotment decision was not ripe for judicial review). There is thus no hardship in withholding court consideration here. *See id.* at 1467.

It is also unclear whether Clay has demonstrated an injury sufficient to satisfy Article III standing. *See Rainbow/Push Coalition v. FCC*, 396 F.3d 1235, 1240 (D.C. Cir. 2005), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Clay asserts that he is a transient listener of some stations that may be affected by the *Order*, stating that he listens to local radio stations during recreational trips to rural areas within a 150-mile radius of his home and in other parts of the country. Motion at 16-18. This Court has recognized the doctrine of listener standing, *see Huddy v. FCC*, 236 F.3d 720, 722 (D.C. Cir. 2001), but Clay's asserted injury is inadequate. *See CHET-5 B'casting, L.P.*, 14 FCC Rcd 13041, 13042 (1999) (listener standing cannot rest on transient or infrequent contacts with a station). *See also Lujan*, 504 U.S. at 564 (profession of intent to return to places visited before does not demonstrate injury in fact). Clay also suggests that he would have standing due to his participation in the rulemaking proceeding, but such participation "does not establish that the petitioner has

constitutional standing to challenge those proceedings in federal court." *KERM*, 353 F.3d at 59

Even if a court were to reach his claims, Clay has not shown "a substantial case on the merits." *Cuomo*, 772 F.2d at 974. In the challenged *Order*, the FCC reasonably decided to use a one-step adjudicatory proceeding to evaluate community of license change proposals by existing FM stations, after concluding that streamlined procedures would serve the public interest by speeding new service to the public and eliminating redundant processing. *Order* ¶¶ 9-10, 15.

Contrary to Clay's argument, Motion at 5-6, the FCC was careful to assure the ability of interested parties to participate in the streamlined application proceedings. *Order* ¶ 12. Clay maintains that the inability to file formal petitions to deny pursuant to 47 U.S.C. § 309(d) "insulate[s]" community of license decisions from judicial review, Motion at 6, but he does not dispute that the FCC's rules and regulations guarantee the right to present the same arguments and evidence in an informal objection as in a petition to deny, *Order* ¶ 12; *see* 47 C.F.R. § 73.3587, as well as the right of aggrieved parties to petition for reconsideration (and seek judicial review) of adverse FCC decisions. *Order* ¶ 12; 47 U.S.C. §§ 402(b)(6), 405.[6] To further assure reasonable opportunities for public

[6] Indeed, Clay has availed himself of the opportunities to participate in streamlined application proceedings provided by FCC rules and regulations. For example, he has participated in the community of license change application process for

participation, the *Order* provided for the additional safeguards of local public and *Federal Register* notice and a 60-day waiting period. *Order* ¶ 12. The *Order* thus neither deprives the public of access to the community of license change process nor insulates the process from judicial review.

There is no basis for Clay's assertion that the *Order* violates the FCC's statutory mandate under 47 U.S.C. § 307(b) to assure fair and equitable distribution of radio service. Motion at 3. The FCC emphasized that assuring compliance with Section 307(b) was a "primary" focus of consideration of its streamlining proposals. *Order* ¶ 4. It concluded that a one-step process, which it has used for other FM station modifications for years, could be used for community of license change proposals consistent with the statute because in the one-step process the FCC will continue to be bound by the allotment priorities that it has applied consistently for over 25 years. *Order* ¶ 10.

Clay asserts that the FCC arbitrarily ignored arguments that it should modify those standards, Motion at 10-12, but the agency specifically concluded that doing so in connection with the procedural changes adopted in the *Order* "would create needless uncertainty." *Id.* ¶ 11. Overhauling these substantive standards as Clay

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WNOW-FM, one of the stations that he claims to listen to during his recreational trips. See Motion at 16. The FCC's staff considered and denied Clay's informal objections in granting WNOW-FM's one-step application to change its community of license to Bessemer City, North Carolina. *See Letter to Mr. William B. Clay*, 23 FCC Rcd 8412, 8413-15 (Media Bur. 2008). On July 7, 2008, Clay filed an application for review which is now pending before the Commission.

advocates would be a fundamentally different enterprise from streamlining the FCC's procedures, and the decision not to undertake such an enterprise in this proceeding was eminently reasonable.

B. Clay Has Not Established Irreparable Harm.

Even if Clay could demonstrate a likelihood of success on the merits, he would not be entitled to a stay because he has not established that he would be irreparably harmed without one. The Supreme Court has stressed that the "basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959)). "A party moving for a stay is required to demonstrate that the injury claimed is 'both certain and great.'" *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 976 (D.C. Cir. 1985) (quoting *Wisconsin Gas v. F.E.R.C.*, 758 F.2d 669 (1985)).

Under this standard, Clay has failed to demonstrate any harm that would justify a stay. He claims that his arguments will become effectively moot if stations are permitted to go on changing their communities of license because effective relief could not be granted. *See* Motion at 1-2, 17-18 ("In practice, authorized station moves become irreversible."). This is not the case. First, if the FCC were to allow an individual station to which Clay listens to change its community of license under the new procedures, Clay has the opportunity at that

time to ask the Court to stay the move pending judicial review. Moreover, even absent a stay, a community of license change, once implemented, is not beyond the power of the Court to order the FCC to undo if the Court concludes that the FCC erred in granting the proposal. *See, e.g., Improvement Leasing Co.*, 73 FCC 2d 676, 684 (1979) (it is well-established that an applicant that proceeds in reliance on a FCC action prior to final administrative or judicial review of the agency's decision exercises its own independent business judgment and proceeds at its own risk with the full understanding that it may ultimately be required to undo the act).

Clay waited approximately 19 months after the *Order* took effect to request a stay, and he admits that "[t]here is no well-defined date by which a stay could avoid any specific injury." Motion at 1. He also acknowledges that few of the community of license changes to which he objects will occur near his residence, arguing only that "some" unspecified changes will injury him irreparably. *Id.* at 17. These bare allegations of what is likely to occur plainly fail to prove that "[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Wisconsin Gas*, 758 F.2d at 674 (emphasis in original) (internal quotes and cites omitted). *See Cuomo*, 772 F.2d at 976 (low-power testing that would irradiate a nuclear reactor, irreversibly changing

the status quo, did not amount to irreparable harm where petitioners only vaguely sketched contours of the asserted harm).[7]

C. A Stay Would Harm Other Parties And The Public Interest.

In adopting the *Order*, the Commission found that a streamlined, one-step allocation process for community of license change proposals would serve the public interest by speeding the implementation of FM service modifications and eliminating redundant processing. *Order* ¶¶ 9-10, 15. In addition to denying prospective applicants and the Commission staff relief from the unnecessarily time-consuming and burdensome two-step procedures that the *Order* modified, a stay effectively would place all community of license modifications by existing and future FM stations on hold. *See* Motion at 5 (seeking stay "of all Commission action approving FM city of license changes that are based in whole or in material part upon any claim of a 'first local service' allotment preference"). As a result, a stay would deny the public the benefits of enhanced service that the FCC sought to facilitate in the *Order*. This factor weighs heavily against granting a stay in this case because of Clay's unexplained tardiness in requesting one. *See Graddick v. Alabama*, 453 U.S. 928, 936 (1981) (Powell, J., in chambers) ("In deciding whether to grant extraordinary equitable relief pending appeal, this Court must

[7] Because Clay has failed to show any irreparable harm, his bare assertion that the Court should grant a stay under 28 U.S.C. § 1651(a) in order to "protect its ultimate jurisdiction" lacks merit. Motion at 15.

consider the confusion and disruption that affirmative action might occasion. This equitable concern weighs most heavily in a case ... in which the applicant has moved with unexplained tardiness.").

The challenged *Order* reflects the Commission's considered judgment regarding where the public interest lies. As the Supreme Court has emphasized, "the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." E,g., *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). In contrast, Clay's argument that the public interest favors maintenance of the status quo carries no weight, for it essentially rehearses his meritless arguments about irreparable harm associated with the processing of community of license change applications. *See Cuomo*, 772 F.2d at 978.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for stay.

Respectfully submitted,

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September 8, 2008

IN THE UNITED STATES COURT OF APPEALS
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William B. Clay, Petitioner

v.

Federal Communications Commission & USA, Respondents

Certificate Of Service

I, Eldoris B. Jackson, hereby certify that the foregoing "Opposition To Motion For Stay Pending Judicial Review" was served this 8th day of September, 2008, to the following persons at the addresses below:

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